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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

**TOLL FREE SERVICE
ACCESS CODES**

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CC Docket No. 95-155

To: The Commission

**JOINT REPLY COMMENTS OF AIRTOUCH PAGING
AND ARCH COMMUNICATIONS GROUP**

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November 20, 1995

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SUMMARY

AirTouch Paging and Arch Communications Group (the "Joint Commenters") have analyzed the comments filed in the toll free service access code (SAC) docket, and are submitting a joint reply.

The reply cites substantial support in the record for the FCC taking a leading role in fostering a fair approach to managing toll free SACs. The commenters generally support maintaining current SAC conservation policies until the 888 SAC is introduced. There is also broad support for establishing an early warning system that will provide adequate advance notice to the industry of an impending need to implement further toll free SACs.

Commission proposals to establish new detailed conservation and implementation rules respecting future toll free SACs beyond 888 received less support. Commenters caution the Commission against promulgating burdensome rules which may prove to be unnecessary.

Industry participants do not align on certain aspects of the NPRM. The areas of disagreement include (a) whether and how current lag times should be changed to facilitate the release of toll free numbers not being used; (b) whether DSMI should continue to be the SMS database manager; and (c) how directory assistance should be handled for the 888 and other new toll free SACs. AirTouch Paging

and Arch recommend that the Commission resolve these matters in separate rulemaking proceedings.

Finally, AirTouch Paging and Arch conclude the Commission should not adopt rules which would (a) provide a right of first refusal to current 800 number holders allowing them to secure the reciprocal 888 number; (b) partition toll free SACs by either services provided, user types, or usage levels; and (c) unnecessarily limit, through the use of reservation caps, circuit breakers or limits on mechanized reservation systems, the ability of RespOrgs, service providers, and subscribers to reserve toll free numbers.

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AirTouch Paging and Arch Communications Group ("Arch"), by their attorneys, hereby submit their Joint Reply Comments in the above-captioned proceeding.^{1/} In reply, the following is respectfully shown:

I. Preliminary Statement

1. AirTouch Paging and Arch are substantial providers of narrowband wireless services throughout the United States. Based upon the significant potential impact of this proceeding on its business, AirTouch Paging filed detailed initial comments in this proceeding.^{2/} While Arch did not submit comments during the initial round of this

^{1/} The proceeding was initiated by the release of the Notice of Proposed Rulemaking, FCC 95-155, released October 5, 1995 (the "NPRM").

^{2/} Id.

proceeding, it finds itself to be in substantial agreement with the initial comments of AirTouch Paging and is joining in this reply with AirTouch Paging as an interested and informed party. AirTouch Paging and Arch have now carefully reviewed the comments filed by other parties and are jointly submitting this reply to help summarize the record of the proceeding, and to set forth their conclusions regarding the specific instances in which regulation is necessary and appropriate based upon the complete record.

**II. The Comments Affirm Several of the Commission's
Tentative Conclusions and Many Positions of
AirTouch Paging and Arch**

2. Comments were filed in this proceeding by interested parties representing a complete cross-section of the telecommunications industry. The commenters include trade associations,^{3/} federal, state and local governmental

^{3/} See Comments of Ad Hoc Telecommunications Users' Committee; Alliance for Telecommunications Industry Solutions, Inc. ("ATIS"); American Car Rental Association ("ACRA"); Americas Carrier Telecommunication Association ("ACTA"); California Banker's Clearing House Association; the Competitive Telecommunications Association ("CompTel"); the Direct Marketing Association ("DMA"); the 800 Users Coalition ("Coalition"); the National Telephone Cooperative Association ("NTCA"); New York Clearing House Association; the Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO"); the Personal Communications Industry Association ("PCIA"); Telco Planning, Inc.; the Telecommunications Resellers Association ("TRA"); the United States Telephone Association ("USTA").

agencies,^{4/} the regional bell operating companies,^{5/} interexchange carriers,^{6/} competitive carriers,^{7/} paging companies,^{8/} local exchange carriers,^{9/} other telecommunications service providers,^{10/} and other individuals and companies.^{11/} Since every important

^{4/} See Comments of the General Services Administration ("GSA").

^{5/} See Comments of Ameritech ("Ameritech"); Bell Atlantic ("Bell Atlantic"); BellSouth Telecommunications, Inc. ("BellSouth"); NYNEX Telephone Companies ("NYNEX"); Pacific Bell ("PacBell"); SBC Communication Inc. ("SBC"); Southwestern Bell Telephone ("Southwest"); and US West, Inc. ("US West").

^{6/} See Comments of Allnet Communications Services ("Allnet"); AT&T Corp. ("AT&T"); Cable and Wireless ("C&W"); Citizens Utilities Company ("Citizens"); LCI International, Inc. ("LCI"); LDDS Worldcom ("LDDS"); MCI Telecommunications Corporation ("MCI"); Qwest Communications Corp. ("Qwest"); Scherers Communications Group, Inc. ("Scherers"); Sprint Corporation ("Sprint"); Unitel Communications Inc. ("Unitel").

^{7/} See Comments of MFS Communications Company, Inc. ("MFS"); NEXTLINK Inc. ("NEXTLINK"); and Time Warner Communications Holding, Inc. ("T/W").

^{8/} See Comments of AirTouch Paging ("AirTouch"); and Paging Network, Inc. ("PageNet").

^{9/} See Comments of Puerto Rico Telephone Company; Southern New England Telephone ("SNET").

^{10/} See Comments of Aeronautical Radio Inc. ("ARINC"); American Telegram Corporation ("ATC"); Promoline Inc.; TLDP Communications Inc. ("TLDP").

^{11/} See Comments of Americom Network; American Petroleum Institute; Applied Anagramics, Inc.; The Associated Group; Auto Club of Missouri; Avis Rent A Car System, Inc. ("AVIS"); Avery Dennison Corp.; Bass Pro Shops ("Bass Pro"); Bass Tickets; Eleonore Brock; Charter Medical Corp.; Communications Managers ("CMA"); Communications Venture Services Inc.; Joel DeFabio;
(continued...)

segment of the communications business that will be affected by future management of toll free service access codes is well represented in the docket, the Commission can proceed to make many informed judgments based upon the record of the proceeding.

3. The comments reflect a consensus applauding the Commission's leadership in addressing future management of toll free SACs. Generally, the commenters support the steps the FCC has taken and proposes to maintain to ensure a smooth transition from the 800 to 888 SAC. There is

^{11/}(...continued)

Crestar Financial Corp.; Del Webb Corp.; Dial-A-Mattress; 1-800-BALLOON; 1-800-BUDGET Gateways; 1-800-Courier, Inc.; 1-800-FLOWERS; 1-800-Therapist Network; 800 Tickets International; Enterprise Rent-A-Car, Inc.; Fruit Baskets Unlimited; Carolyn P. Green; Greer Marketing Group; G. Murray Greer; Heartland Express; Hertz Corporation; Doug Hicks; Home Access Health Corp.; Huntington Service Co.; Hyatt Hotels and Resorts; Industrial Packing Inc.; Ingersoll-Rand; Invesco Funds Group Inc.; Johns Hopkins University; Lifescan Inc.; Loewen Group, Inc.; First Digital; Maritz, Inc.; Mueller Industries, Inc.; Nabisco; Network Telephone Service; New Hair Institute; Noritsu America Corporation; Northwest Airlines, Inc.; Norwest Technical Services, Inc.; Oceans Eleven Resorts Inc.; Mark D. Olson; Olsten Corp.; Oracle Corp.; Joseph Edward Page; Philbrick's Sports Superstore; QVC, Inc.; Private Citizen, Inc.; Roadway Information Technology, Inc.; Roadway Package System, Inc.; Nissan Rosenthal; Robert Schwimer; Service Merchandise Co.; Sigma-Aldrich Corp.; South Windsor Arena & Sports Complex; Spiegel, Inc.; Staples, Inc.; Robert L. Stitt; Fred Stone; Tansin A. Darcos & Co.; Telecompute Corp.; Telemation International, Inc. ("Telemation"); Telmark Sales, Inc.; Timex Corp.; TLDP Communications, Inc.; Trench Shoring Services; Vanity International; Weather Channel, Inc.; Westvaco; VISA USA, Inc.; Vivian Williams; Wise Telecommunications; World Savings and Loan Assoc.; Zachary Software Inc.

consensus on the need to create high-level plans to guide the industry towards the future, including identification of the next set of toll free SACs to be released. The overarching goal of the plan should be to create procedures aimed at providing timely notice of the need to implement new SACs. However, several commenters share the position of AirTouch Paging and Arch in advocating limited rules to govern future transitions and for managing toll free SAC number allocation. The majority of commenters caution the Commission not to set in stone procedures regulating future SAC transitions and number allocations until more information on the effectiveness of the 800/888 transition, and on the future demand for toll free services, can be gathered.

III. The Commission Should Adopt Certain Consensus Recommendations of the Commenters

4. A large majority of the commenters support proposals that allow consumers to call any 555-1212 number tied to a toll free SAC and receive directory assistance for all toll free numbers.^{12/} In view of this consensus the (888) 555-1212 number should be set aside for this purpose.^{13/}

^{12/} See, e.g., Comments of NYNEX, p. 10; PacBell, p. 15; Scherers, p. 18; Sprint, p. 25; TRA, p. 20-21.

^{13/} The agreement to set aside (888)555-1212 should be read in conjunction with the commenter's input on bringing
(continued...)

5. An overwhelming majority of commenters rejected the Commission's proposal to use escrow account deposits as a means for discouraging warehousing and hoarding.^{14/} Like AirTouch Paging and Arch,^{15/} these commenters found that escrow accounts are not a viable solution because they would be difficult to administer, operate in a discriminatory fashion against smaller or less profitable business entities,^{16/} and take capital away from more productive uses.^{17/}

6. Industry participants also applaud the Commission's tentative decision to encourage, rather than

^{13/} (...continued)
competition to toll free directory assistance services.
See para. 14 of this Reply.

^{14/} See, e.g., Comments of ACTA, p. 10; ATC, p.2; Bell Atlantic, p. 2; Bell South, p. 4; LCI, p. 4-5; LDDS, p. 5; MCI, p. 3; PageNet, p. 6; Sprint, p. 4-5.

^{15/} See Comments of AirTouch Paging, p. 10-11.

^{16/} See Comments of Scherers, p. 6. Allnet's proposal to use higher monthly fees for low volume users instead of escrow deposits is equally discriminatory.

^{17/} See Comments of LDDS, p. 5. Qwest proposes that the deposit only apply to RespOrg's that have on reserve five percent or more of all toll free numbers. Comments of Qwest, p. 3; see also Ameritech's similar proposal based on RespOrgs who have on reserve one percent of all toll free numbers. These proposals assume large RespOrg's are the only entities warehousing numbers. Without more data supporting this assumption, it would be unfair of the Commission to disproportionately burden this one segment of the market.

mandate, the use of PIN technology.^{18/} AirTouch Paging and Arch ask the Commission to affirmatively declare its decision to let the industry determine on its own when and how PIN technology should be implemented.^{19/} This decision is warranted based on comments stating that not all service providers or RespOrgs can accommodate PINs at this time;^{20/} that PINs can create customer inconvenience resulting from the need to dial extra digits;^{21/} that PINs can inhibit number portability and the deployment of advanced services derived from SS7 technology;^{22/} and the SMS Database would have to be modified to handle PINs.^{23/}

^{18/} See, e.g., Comments of AT&T, p. 12; LDDS, p. 6; Telco Planning, p. 3.

^{19/} See Comments of LCI, p. 7; PageNet, p. 6-8; PCIA, p. 9-10; US West, p. 10.

^{20/} See Comments of Bell South, p. 8; OPASTCO, p. 10. LDDS states it would have to spend over \$600,000 just to increase the memory in its switches in order to handle PIN technology. Comments of LDDS, p. 6.

^{21/} See Comments of AVIS, p. 10; PacBell, p. 5-6.

^{22/} See Comments of Ameritech, p. 13; ATC, p. 2; LCI, p. 6; MFS, p. 6; PCIA, p. 8-9; Sprint, p. 7. The 800 Users Coalition argues that if the Commission mandates PIN use, then no competitive impact will be felt because all parties must accommodate the technology. Comments of Coalition, p. 7. This argument fails on two counts. First, the Coalition supports mandates only for paging services. This unfairly singles out one segment of the market. Second, PIN mandates would erase all of the progress made to cultivate the industry with more advanced paging capability. Consumers would find their needs going unserved, possibly to the point of stifling any further industry growth or causing people to abandon the service all together.

^{23/} Comments of US West, p. 10-11.

7. A significant majority of commenters support the Commission's proposal that affirmative requests should be the primary basis for reserving or assigning toll free numbers. The practice of reserving large blocks of numbers without a known customer was generally discouraged. Commenters did note that, at times, reservations made without firm orders were necessary to complete marketing plans or to anticipate a major change in demand by one of its subscribers.^{24/} Industry participants claim this practice does not constitute warehousing because the RespOrg usually follows the reservation with a firm order within the established reservation period. AirTouch Paging and Arch recognize that some lead time is necessary to allow service providers and RespOrgs to implement proactive sales efforts. So long as the reservations are either released or supported by order documentation at the time of assignment, this practice should not be barred.

8. Some RespOrgs and Service Providers give away toll free numbers to attract new business. If these numbers are put into working status and are paid for by someone in a reasonable time frame, this practice does not appear to have any negative implications that give rise to the need for regulation at this time. If the Commission later finds that consumers are being badgered to take services they do not

^{24/} See Comments of ATC, p. 2; Ameritech, p. 2; Bell Atlantic, p. 2; C&W, p. 2; CompTel, p. 6; MFS, p. 3.

want, or are being misled regarding the nature of the "free" service they are receiving, the Commission may elect to proceed on a case-by-case basis, or initiate a further inquiry on this practice at a later date.^{25/}

9. Finally, while the recommendations differ on the type of proof that should be required to demonstrate the existence of a subscriber, many commenters echo the conclusion of AirTouch Paging and Arch that the Commission should not subject subscribers to burdensome paperwork requirements.^{26/} Oral requests for service should be allowed so long as they are followed up in a reasonable time with firm orders. Any form of written request for service should suffice. Retention of the proof should be held by the RespOrg until the reservation is cancelled, the number is disconnected, or 2 years has passed, whichever is shorter.

10. All commenters acknowledge the need to keep the public informed of the upcoming 800/888 SAC transition. Many describe the educational efforts they have implemented in the past and intend to implement in the future. With very few exceptions,^{27/} the commenters ask that the Commission allow the industry to determine when and how the

^{25/} See Comments of Sprint, p. 2.

^{26/} See Comments of Ameritech, p. 4; AT&T, p. 7; Sprint, p. 3.

^{27/} See, e.g., Comments of ARINC, p. 6; MCI, p. 22.

public they serve should be educated. AirTouch Paging and Arch support this voluntary approach in light of the considerable efforts already being made to inform the public which make regulatory mandates unnecessary. Furthermore, the industry is in a better position to understand the needs of its market and to customize its efforts accordingly.

IV. Further Study is Needed on Certain Issues

11. The Commission asked for input on how lag times might be changed in order to move numbers more quickly into working or available status. The commenting parties had diverse views on this subject. AirTouch Paging supported time reductions in most categories,^{28/} but asked that the aging period be extended to one year to correspond to a full Yellow Pages publishing cycle because of recurring problems AirTouch Paging has had in misdirected calls to its customer's pagers due to the fact that a discontinued number still appears in the Yellow Pages.^{29/} Other commenters take the position that the shortest possible periods be established for all categories.^{30/} Others propose reductions in some of the categories, while leaving others

^{28/} See Comments of AirTouch Paging, p. 16-17.

^{29/} Arch has experienced similar problems.

^{30/} See Comments of Bass Tickets, p. 2; Promoline, p. 3.

as they are today.^{31/} Finally, some comments ask that the status quo be maintained.^{32/}

12. Vast differences of opinion also arose on what the new durations should be on categories that were to be changed. For example, assignment status suggestions ran from 30 days to 9 months.^{33/} Considering the lack of consensus on these important issues, AirTouch Paging and Arch now believe that the status quo should be maintained for the time being until more information can be gathered. Any changes adopted on the basis of the current record would be arbitrary. AirTouch Paging and Arch would recommend, however, that the Order in this docket encourage all industry participants to become more rigorous in implementing internal efforts to release numbers which are not being used so that further regulation in this area does not become necessary.

13. Determining who should administer the SMS Database also should be delayed or decided in a separate rulemaking proceeding. Several parties commented that this is an important issue but does not fit into the subject

^{31/} See Comments of AT&T, p. 9-10; Bell South, p. 5-7; DMA, p. 6-9.

^{32/} See Comments of ATIS, p. 9-11; Allnet, p. 5; Ameritech, p. 9-12; AVIS, p. 9; LCI, p. 4-5; MCI, p. 4-6; MFS, p. 5-6; US West, p. 7-9.

^{33/} See Comments of ACTA, p. 10; Bass Tickets, p. 2; LDDS, p. 4; Promoline, p. 3; Sprint, p. 6.

matter of this proceeding.^{34/} For example, US West claims that any change in this area would be a reconsideration of two Commission Orders mandating the RBOCs to oversee the database.^{35/} Others, like AirTouch Paging and Arch, are open to selecting a new administrator, but believe making this decision now is unnecessary, there being no substantial evidence in the record that DSMI is acting in a biased manner.^{36/} Under these circumstances, picking an independent administrator^{37/} can safely be deferred until the 800/888 transition is complete and the systems are running smoothly.

14. There is strong support for opening up toll free directory assistance service to competition, but the suggestions on how this should be implemented are not detailed enough to allow the Commission to make an informed decision on this matter. AirTouch Paging and Arch therefore suggest that the Commission refrain from promulgating rules on this subject area until a more concrete plan can be developed. ^{38/}

^{34/} See Comments of Ameritech, p. 37; Southwestern Bell, p. 19-20.

^{35/} See Comments of US West, p. 27-28 (discussing the history of SMS Database management and the Commission's Orders in CC Dockets 86-10 and 93-129).

^{36/} See Comments of Bell Atlantic, p. 10; Telco Planning, p. 6.

^{37/} DSMI is affiliated with the RBOCs.

^{38/} See Comments of LDDS, p. 10.

**V. Rights of First Refusal Should Not
Be Granted to 800 Number Users**

15. Several commenters support granting existing 800 number subscribers a right of first refusal in the matching 888 number. These commenters defend granting the right by arguing that a significant investment has been made in the number;^{39/} brand recognition and goodwill have been established;^{40/} confusion will result when customers dial the 888 number expecting to reach one business and instead reach another;^{41/} consumers will be led unwittingly or fraudulently to purchase inferior services from competitors riding on the coat-tails of another's marketing efforts^{42/} and; costs incurred and business losses sustained from misdialed numbers will increase.^{43/}

^{39/} See Comments of ACRA, p. 4; AVIS, p. 6; Crestar, p. 1.

^{40/} See Comments of ACRA, p. 4.

^{41/} Id. at p. 5; Bass Pro, p. 2; Crestar, p. 2.

^{42/} See Comments of Bass Pro, p. 2; US West, p. 20

^{43/} See, e.g., Comments of 1-800-Flowers, p. 3-8. AirTouch Paging and Arch reiterate their proposal that the misdialed number problem would be better addressed by requiring each RespOrg to identify the toll free numbers which account for the top ten percent of usage. These numbers should then be set aside for six months, at which time they will be released as available. The six month period would allow consumers to become familiar with the new 888 SAC and would limit the possibility of a new 888 user being assigned the reciprocal number of a high volume 800 user. The negative affect of misdialed numbers is thus mitigated without permanently reducing the pool of toll free numbers. See Comments of AirTouch Paging, p. 19.

16. AirTouch Paging and Arch feel strongly that the Commission cannot afford to encumber the new toll free numbers with the proposed rights of first refusal.^{44/} As users of 800 numbers, AirTouch Paging and Arch understand the value of toll free numbers and the importance of maintaining their effectiveness as tools of superior customer service. The fears of degradation expressed by proponents of a right of first refusal are understandable, but are largely speculative at this point in time. Consequently, the right should not be granted.

17. To grant all, or even a portion of, 800 number users the right to replicate contradicts a long history establishing that users and service providers do not have a property right in particular numbers.^{45/} The Commission has repeatedly stated that telephone numbers are a public resource not owned by any one user. Granting a

^{44/} The following commenters are in agreement with AirTouch Paging and Arch's position: Comments of Allnet, p. 9; Ameritech, p. 31; Bell Atlantic, p. 8; BellSouth, p. 15; CMA, p. 1; CompTel, p. 12; C&W, p. 4; Joel DeFabio, p. 1; The Loewen Group, p. 2; First Digital, p. 1; LCI, p. 8; Maritz, Inc., p. 1; NYNEX, p. 7; PacBell, p. 10; Joseph Page, p. 2; PageNet, p. 13; Scherers, p. 15; SNET, p. 12; Southwestern Bell Telephone, p. 16; Sprint, p. 18; Unitel, p. 3; USTA, p. 4; US West, p. 18.

^{45/} See Comments of Bell Atlantic, p. 8; USTA, p. 1; see also, In the Matter of Administration of the North American Numbering Plan, 78 Rad. Reg. 2d (P&F) 821, para. 4 (1995); In the Matter of Proposed 708 Relief ... (Ameritech), 10 FCC Rcd. 4596 (1995); In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd. 2910, 2912 (1987).

right of first refusal countermands this prior authority, and implicitly recognizes a property right.^{46/} Once users start to rely on this right, government entities and industry participants will find themselves subject to a variety of law suits that will only make the industry more complicated and will delay implementation of necessary plans through protracted litigation.^{47/}

18. Granting a right of first refusal also subjects the industry to the real possibility of a run on numbers large enough to prematurely trigger the need to implement yet another SAC.^{48/} In this regard, AirTouch Paging and Arch are unconvinced by those who argue that the percentage of numbers that would be preempted by a right of first refusal on "vanity" numbers is low.^{49/} This argument is premised on a definition of vanity numbers that covers only mnemonics and is based on the number of cognizable words that can be formed by word generation programs. But, users may consider vanity numbers to go beyond those that

^{46/} See Comments of C&W, p. 4.

^{47/} For example, public utility commissions and the FCC could find themselves facing more due process and takings claims whenever they promulgate rules which affect telephone numbers. Pacific Bell expresses concerns over the affect such a rule could have on plans affecting geographic area codes. Comments of PacBell, p. 12.

^{48/} See Comments of CMA, p. 1; LCI, p. 9; USTA, p. 7; US West, p. 18.

^{49/} See Comments of ARINC, p. 5; Coalition, p. 15-17; TLDP, p. 2-3.

form words.^{50/} An easily remembered sequence of numbers (888-765-4321) could be a vanity number, as could any other number which has been heavily advertized or used in a market segment.^{51/} Some proponents recognize the definition problem and state that all 800 users should have a right of first refusal.^{52/} As it would be impossible for the RespOrg to independently determine whether a number is a vanity number, and any user could argue their numbers fit the definition proposed by the Commission, the argument is that no one should be left out.^{53/}

19. AirTouch and Arch also are unconvinced by the SMS/800 Number Administration Committee ("SNAC") survey which is purported to suggest that less than 25% of users want to replicate their number.^{54/} Any policy that preempts up to one fourth of the available numbers is a

^{50/} The Commission itself proposed a definition which is very broad: a vanity number includes numbers for which the associated letters spell a valuable word or "any numbers in which the holders have a particular interest, be it economic, commercial or otherwise." NPRM at para. 35.

^{51/} See Comments of ACRA, p. 2; Ameritech, p. 30; Bell Atlantic, p. 7.

^{52/} See Comments of ACRA, p. 3-4; ATC, p. 3; LDDS, p. 12.

^{53/} Comments of Ameritech, p. 31; C&W, p. 5; Communications Venture Services, p. 3. This could obviously lead to an immediate exhaustion of the new 888 SAC if all 800 number holders requested a right of first refusal. Not only is this inefficient, but also does not serve the public interest.

^{54/} See Comment of ATIS, p. 17 and Attachment B; C&W, p. 7; Scherers, p. 14 and Attachments.

matter of concern. Moreover, no one is in a position to guarantee the accuracy of the survey.^{55/} A significantly larger percentage might actually reserve their number, but this would not be known until it was too late. On balance, AirTouch Paging and Arch believe that granting the right without any restrictions solely on the basis of survey data would expose the industry to too great a risk of higher-than-expected demand.

20. AT&T addresses the problem to some extent by limiting to fifteen percent the quantity of numbers a single RespOrg could set aside for replication.^{56/} This option raises fairness concerns. The RespOrg would be put in the awkward position of having to choose between competing customer demands. This plan also could end up protecting only the largest customers (including the RespOrg itself), leaving small business and personal user needs unserved.

21. AirTouch Paging and Arch believe that concerns over the misappropriation or unfair use of a similar toll free number should be addressed through existing laws on unfair competition and not by FCC regulations.^{57/} In addition to trademark protection, state and federal unfair competition laws are useful for any

^{55/} For instance, if 800 number users knew they could get an 888 number, they might reserve it in an effort to deny it to a competitor.

^{56/} See Comments of AT&T, p. 23.

^{57/} See also Comments of Allnet, p. 9.

business encountering another entity engaged in false representation or misappropriation. Courts have upheld claims involving telephone numbers under these theories.^{58/} Words tied to numbers that can meet the trademark standards for fanciful, arbitrary, or suggestive marks would be protected under the Lanham Act. Creating special rules in the communications industry only results in redundancy. Offended parties have causes of action elsewhere. To encourage reliance on these other areas of the law makes efficient use of the legal and regulatory resources already in place.

22. Some commenters criticize current trademark and unfair competition laws as being inadequate to protect against abuses in the use of similar numbers.^{59/} For example, some point out that trademark protection does not attach if the mark to be protected is anchored in a generic or descriptive term.^{60/} Thus, if a telephone number spells the product or a name of a company which is considered generic or descriptive, trademark protection would not be

^{58/} See, e.g., Dial-A Mattress Franchise Corp. v. Page, 880 F.2d 675 (2d. Cir. 1989); Holiday Inns, Inc. v. 800 Reservation Inc., 838 F. Supp. 1247 (E.D. Tenn. 1993); Murrin v. Midco Communications Inc., 726 F. Supp. 1195 (D. Minn. 1991); American Airlines, Inc. v. 1-800-AMERICAN Corp., 622 F. Supp 673, (N.D. Ill. 1985).

^{59/} See Comments of ARINC, p. 5; 1-800-FLOWERS, p. 14-15.

^{60/} Dranoff-Perlstein Assoc. v. Sklar, 967 F.2d 852 (3d Cir. 1992); A.J. Canfield Co. v. Honickman, 808 F.2d 291 (3d Cir. 1986).

available.^{61/} AirTouch Paging and Arch find these arguments to cut against rather than in favor of the granting of a right of first refusal. The Commission should be extremely reluctant to grant regulatory rights that exceed fair trade rights that have evolved over many years of legislative and judicial action.

23. Less intrusive variations on the right of first refusal were suggested by some commenters, but none serve the public interest in the view of AirTouch Paging and Arch. DMA asked that current 800 number holders be given the right to veto an assignment if they fear confusion or unfair competition.^{62/} This option is too subjective and places too much power in the hands of current 800 users to limit a potential competitor's business plan. It would also be quite burdensome on all parties involved. Another proposed solution would allow assignment of an 888 number that can spell a word already used by an 800 user but limits the use of the mnemonic to a newcomer in a different line of business or bars the use of the mnemonic completely.^{63/} This would call for impossible line drawing, and no doubt foster litigation. For example, can a newcomer wanting the

^{61/} 1-800-FLOWERS could not be trademarked because it is generic for the sale of the product. 1-800-4APPLES could possibly be protected by Apple Computers because Apple has been determined to be an arbitrary name for a computer.

^{62/} See Comments of DMA, p. 12.

^{63/} See Comments of TRA, p. 17; US West, p. 21.

888 number that spells "ROADMAP" for an interactive radio-based traffic information service get it if the 800-ROADMAP number user sells maps? This proposal also is burdensome as it would slow order processing and would be difficult to police for abuse.

24. Service Merchandise supports a right of first refusal only for high volume users.^{64/} This option has definition problems and is also discriminatory towards users who may not have high usage but have well-cultivated recognition of their number in a particular market niche. A final option is to charge a very large fee and to require monthly usage on the reciprocal number in order to exercise and maintain the right.^{65/} This option is discriminatory against small users who value their numbers but cannot afford to pay the fee.

^{64/} See Comments of Service Merchandise, p. 1; see also Comments of 1-800-BALLOON. A subscriber's failure to comply would result in the RespOrg taking the number away.

^{65/} See Comments of Bass Pro, p. 3; Promoline, p. 7-8; Qwest, p. 7-8. LDDS makes a similar proposal. An 800 user would get a limited right, exercisable only for the 888 SAC, which allows the user to reserve the reciprocal 888 number for a one-time fee of \$1,000 plus a monthly fee of \$200. In return, the party can put the number in service or can simply set it aside to prevent a competitor from securing the number. Comments of LDDS, p. 14-15. This option highlights the potential for a right of first refusal to exacerbate the inefficient use of numbers. The ability to reserve the reciprocal number only to take it out of service is akin to hoarding and should not be allowed.

25. On balance, the Commission should not grant a right of first refusal. Current 800 number users can submit their requests for the reciprocal 888 number and hope they are the first to receive it. If they are not and a business springs up that unfairly competes with or misrepresents itself as the 800 user's business, the 800 user can turn to the courts for relief. Providing protection up front, in anticipation of wholly speculative harm, will create a larger set of problems than is justified by the benefits the proponents of the right espouse.

**VI. Partitioning SACs Based on User or Service
Categories is Discriminatory**

26. AirTouch Paging and Arch oppose partitioning SACs based upon service types. However, some commenters support the allocation of toll free SACs based on user or service type,^{66/} including the possibility that the 800 SAC be reserved for business uses^{67/} while the 888 SAC be used for messaging and/or personal use.^{68/} Proponents of this

^{66/} See Comments of Bass Pro Shoes, p. 7.

^{67/} Customer service, telemarketing, consumer hotlines, etc.

^{68/} The actual proposals varied. Some suggested a third SAC for personal users. Other suggested that the distinction between 800 and 888 users be tied to usage. Implicit in this suggestion was that paging, voice mail and other messaging applications, as well as personal applications, were low volume uses and would still be relegated to the 888 SAC. See, e.g., Comments of Telco Planning, p. 14.